

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

REC'D TN  
REGULATORY AUTH.

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IN RE: In the Matter of Petition Of Tennessee )  
UNE-P Coalition To Open Contested Case )  
Proceeding To Declare Unbundled Switching )  
An Unrestricted Unbundled Network Element )

OFFICE OF THE  
EXECUTIVE SECRETARY  
Docket No. 02-00207

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**MOTION TO AMEND PETITION AND MOTION TO RECONSIDER THE HEARING  
OFFICER'S FIRST REPORT AND RECOMMENDATION**

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The UNE-P Coalition (the "Coalition")<sup>1</sup> moves to amend the "Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element" (the "Petition") filed by the Coalition on February 25, 2002. The Coalition further requests that the Hearing Officer reconsider the "First Report and Recommendation" in light of the amended Petition.

**MOTION TO AMEND**

The Coalition's Petition requested that the Tennessee Regulatory Authority ("TRA") convene a contested case proceeding "to establish unrestricted switching as a new interconnection service' under state and federal law." Petition at 1. The Petition speaks generally of the obligations of incumbent local exchange carriers to provide access to network elements under Section 251(c)(3) of the Federal Telecommunications Act (42 U.S.C. § 251(c)(3)). Although BellSouth Telecommunications, Inc. ("BellSouth") is the only incumbent carrier specifically mentioned in the Petition (at pp. 6-7, 9), the requested relief, if granted,

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<sup>1</sup> The Coalition includes: Access Integrated Networks, Inc.; AT&T Communications of the South Central States; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCI metro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

would presumably bind any incumbent local exchange provider subject to the unbundling obligations of Section 251(c)(3).

Despite the broad language in the caption and body of the Petition, the Coalition did not intend this proceeding to apply to incumbent local exchange carriers other than BellSouth. In this proceeding, the Coalition asks only that the Authority make circuit switching available as an unbundled network element in BellSouth's service territory, not on a statewide basis.<sup>2</sup>

The Coalition apologizes for the confusing language in the Petition and requests that the Petition be amended by appending the words "throughout the Tennessee service area of BellSouth Telecommunications, Inc." to both the caption and the first sentence of the Petition. Since the proposed amendment reduces the scope of the Coalition's requested relief, no party is prejudiced by this request.

### **MOTION TO RECONSIDER**

In light of the Motion to Amend, the Coalition also asks that the Hearing Officer reconsider his conclusion in the First Report and Recommendation that this proceeding should go forward as a request for rulemaking rather than as a contested case proceeding. The Coalition suggests that a limited request for relief applicable only to one incumbent carrier does not require a rulemaking and that this particular case, which is closely analogous to a hearing to "establish initial rates for new interconnection services provided by an incumbent local exchange carrier" (T.C.A. §65-5-209(d)) can best be conducted as a contested case proceeding.

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<sup>2</sup> The pre-filed testimony of Coalition witness Joe Gillan stated the Coalition's request more precisely than the Petition: "The purpose of my testimony is to recommend that the Tennessee Regulatory Authority require BellSouth to offer unbundled local switching to CLECs seeking to serve any analog line customer (residential and business) throughout Tennessee." Testimony at p. 2. See also the Coalition's "Opposition to BellSouth Motion to Dismiss," at p. 3. (The Coalition "asks the Authority... to make circuit switching available... throughout BellSouth's service area.")

**A. Tennessee Cable Television Test**

The Hearing Officer concluded that, based on the six-part test adopted by the Tennessee Court of Appeals in Tennessee Cable Television Association v. Tennessee Public Service Commission, 844 S.W.2d 151 (Tenn. Ct. App. 1992), the Coalition's request for relief "is more properly executed within a rulemaking framework." First Report, at 6. The Hearing Officer recognized, however, that the Authority "has substantial discretion to establish policy either through rulemaking or adjudication" and that the issues raised in the Coalition's Petition arguably "do not fall squarely within each and every prong" of the Court's six-part test. Id., at 3 and 6. In other words, the choice of procedures is not open-and-shut. While there are arguments in favor of either approach, the Coalition suggests that limiting this case to one incumbent carrier tilts the balance back to a contested case proceeding.

Under the Court of Appeal's six-part test, the agency should proceed with a rulemaking if it appears "in many or most of the following circumstances," that the agency determination:

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

Tennessee Cable Television Association, supra, at 162. Applying this test to the amended Petition produces a somewhat different result than that found by the Hearing Officer:

1. The Coalition's proposed amendment narrows the scope of this proceeding. The relief sought would bind only BellSouth and not, as the Hearing Officer wrote, "all incumbent local exchange carriers."

2. The relief sought is not "intended to be applied ... to all similarly situated persons" except to the extent that the agency's reasoning in this case would likely be cited as precedent should competing carriers request similar relief from other incumbent carriers.

3. There "is no doubt," as the Hearing Officer wrote, that the "relief requested is prospective." First Report, at 1. But that criterion should not be given much weight. As a ratemaking agency, the Tennessee Regulatory Authority rarely grants any relief that is not prospective in application. Such actions as granting a certificate, approving a tariff, rate, or interconnection agreement, and resolving a complaint between carriers or between a customer and a carrier usually involve granting only prospective relief and are typically handled as contested case proceedings.

4. This case does not involve prescribing "a new legal standard or directive." To the extent that Coalition's request seeks to restore the availability of unbundled local switching in Nashville (as opposed to the rest of BellSouth's service territory), the Coalition is asking the Authority to exceed the minimum unbundling requirements presently mandated by the FCC. The Authority, however, has not been asked to accomplish this result through the creation of a new "legal standard" but to apply the FCC's established legal standard, i.e., the "necessary and impair" standard, to the facts presented in this case. Ultimately, the Authority has been asked to issue a new "directive" aimed at BellSouth, but such is the ultimate result of nearly every proceeding, whether contested case or rulemaking.

5. and 6. This case will involve, in part, the making of new regulatory policies. Fairly stated, however, the agency's decision in this case will likely include elements of both fact finding and policy making. As applied to the amended Petition, these criteria do not clearly point to either a rulemaking or a contested case proceeding.

**B. Analogy to T.C.A. § 65-5-209(a)**

Given that the Court's six-part test arguably supports treating the amended Petition either as a contested case or a rulemaking, the Coalition believes that the agency has discretion to do either. The deciding factor, the Coalition suggests, is that a contested case proceeding would be more focused, expeditious, and less expensive for the participants. In recognition of those advantages, state law regarding a closely analogous proceeding mandates the use of contested case procedures.

T.C.A. § 65-5-209(d) requires the Tennessee Regulatory Authority to "hold a contested case proceeding" upon the petition of a competing local service provider "to establish initial rates for new interconnection services" provided by an incumbent carrier. The Hearing Officer has decided that Section 209(d) does not apply to the Coalition's Petition because "by its plain language," the statute "applies only in those instances where there is a failure to reach agreement [on an interconnection rate] and where it is subsequently requested that the Authority establish initial rates for new interconnection services." Order Regarding The Applicability of Tenn. Code Ann. § 65-5-209(d), March 25, 2002, at 5. The Coalition has not and does not challenge that ruling. Nevertheless, it is unarguable that the relief the Coalition seeks is similar, if not identical, to that contemplated by Section 209(d) and that, but for the fact that the parties already have state-approved agreements currently in effect, the parties would now be proceeding under that statute. The Tennessee legislature, in other words, has determined that when a competing local carrier requests a new, unbundled network element from an incumbent carrier and requests that


the Authority fix a cost-based rate for that new element, such a request must be handled as a contested case because of the advantages of contested case procedures over a rulemaking. Those same advantages argue for the use of contested case procedures in this docket.

### CONCLUSION

The amended Petition is intended to make clear that the purpose of this proceeding is to develop a factual record, apply an established legal standard, and make a determination which will directly impact only one incumbent carrier, BellSouth. Although this proceeding admittedly incorporates elements of both policy making and adjudication, the Coalition submits that, on the whole, the matter can be more appropriately and expeditiously handled as a contested case proceeding and that such a procedure would be more in keeping with the intent of the legislature as reflected in Section 209(d).

Therefore the Coalition asks that the Motion to Amend the Petition and the Motion to Reconsider the First Report and Recommendation be granted.

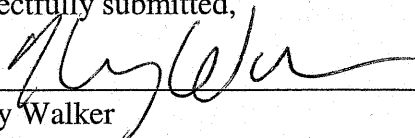
Respectfully submitted,



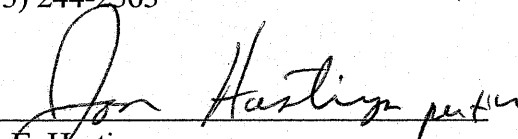
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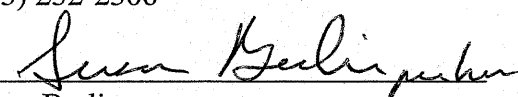
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May 20, 2002

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 20<sup>th</sup> day of May, 2002.

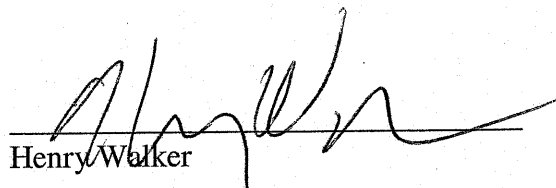
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